IN THE

Supreme Court of the United States

October Term, 1975

No. 76-98

ROBERT J. BARANOV, WORLD MAILING SERVICE, INC., dba WORLD MAILING SERVICE,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

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vs.

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Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Petitioners, Robert J. Baranov and World Mailing Service, Inc., respectfully pray for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit to review its judgment affirming the judgment of conviction of the United States District Court for the Eastern District of Virginia, Alexandria Division.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Fourth Circuit is appended hereto as Appendix "A".

A petition for rehearing was filed and denied. The Order Denying Petition for Rehearing did contain a reference to case authority and therefore is included herein as Appendix "B" as part of the decision of

the United States Court of Appeals for the Fourth Circuit.

Said opinions are not as yet reported.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

1. The judgment of the United States Court of Appeals for the Fourth Circuit, which judgment is sought to be reviewed, was dated May 19, 1976 and entered May 19, 1976.

2. A timely petition for a rehearing was filed (within fourteen days as required by Rule 40 of the Federal Rules of Appellate Procedure). The petition for rehearing was denied on June 23, 1976.

3. The statutory provision which confers jurisdiction upon this court to review the judgment is 28 USCA Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

1. In a prosecution brought pursuant to 18 USC 1461 (mailing of obscene material) may the trial court deny the defense the fundamental due process right to present any expert testimony on the issue of whether the materials in question (which materials were not "hard core" depictions of sex) appealed to the prurient interest of the average person?

2. May advertising brochures advertising sexually oriented materials, constitutionally be found to be legally proscribable under the First Amendment of the United States Constitution where said brochures fall short of being "hard core" depictions of sex and where the candor of description of sex contained in said brochures is entirely comparable to the materials found to be

constitutionally protected by this Honorable Court in *Wiener v. California,* 404 U.S. 988, 92 S.Ct. 534 (1971)?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Involved herein are the First and Fifth Amendments to the United States Constitution; 18 USC 1461.

STATEMENT OF THE CASE.

A. Nature of the Case and Present Posture.

Petitioners Robert J. Baranov and World Mailing Service were indicted in the Eastern District of Virginia on July 11, 1974. The Eleven Count Indictment charged violation of 18 USC 1461 and 1462 (sending obscene materials through the mail).

Trial by jury took place in the Eastern District of Virginia, Alexandria Division, before the Honorable D. Dortch Warriner on September 9, 1974. The trial actually consumed only one day although the jury returned its verdict the following day, September 10, 1974.

During the trial judgments of acquittal were granted as to Counts One, Two and Three. The Jury convicted both defendants as to Counts Four through Eleven.

Thereafter, on October 22, 1974, Judge Warriner sentenced each defendant to pay the maximum fine ($5,000.00) on each count totalling $40,000.00 as to petitioner Baranov and $40,000.00 as to petitioner World Mailing Service.

Petitioners appealed from the judgment convicting them as to Counts Four through Eleven to the United States Court of Appeals for the Fourth Circuit.

Thereafter, the Fourth Circuit Court of Appeals rendered its decision on May 19, 1976, affirming petitioners' conviction. Said opinion is included herein as Appendix "A".

Inasmuch as there were two major issues raised in said appeal and inasmuch as the Court of Appeals for the Fourth Circuit apparently discussed and decided only one of the two issues, a timely petition for rehearing was filed. The issue not discussed or decided was the first issue raised herein, namely, whether a trial court may arbitrarily deny the defense the right to present expert witnesses on the issue of prurient appeal of the material.

Said petition for rehearing was denied, but the denial was based (see Appendix "B") on a reference to the case of *Paris Adult Theatre v. Slaton,* 413 U.S. 49, 56 Note 6 (1972) which reference clarifies the court's reasoning affirming petitioners' conviction. As will be seen from the ensuing argument the Court of Appeals' understanding of the cited language of the *Paris Adult Theatre* case, *supra,* was faulty. This Honorable Court has stated the *prosecution* need not present expert evidence on its case to affirmatively prove the obscenity vel non of materials but it has also stated that the defense should be free to introduce expert testimony if it chooses to.

Thereafter, this Petition for Writ of Certiorari was timely filed.

B. Statement of Facts Relevant to Issues Presented.

I

Nature of Materials Involved.

Originally the materials involved consisted of 8 MM motion picture films and advertising brochures consisting of words and still photographs and drawings. All of the 8 MM motion picture films were charged in connection with Counts Two and Three. Inasmuch as judgments of acquittal were granted as to Counts One, Two and Three [p. 158, lines 16-21 of Tr. of Proceedings] the only materials which are now involved in this petition are those charged in Counts 4 through 11. These consist entirely of illustrated advertising brochures.

These materials consist of photographs and illustrations of nude males and nude females in juxtaposition to one another, some of the pictures may be termed lurid, depict nudity, imply sexual activity and actively give the leer of sexual conduct, nevertheless they are not explicit, "out and out" depictions which leave nothing to the imagination. The advertising brochures involved herein are not "hard core" depictions.

II

Court Proceedings Complained Of.

(a)

At the commencement of the trial, petitioners voluntarily stipulated to all facts in issue except the obscenity vel non of the materials involved [p. 19, line 24-p. 21, line 18 Tr. of Proceedings]. Thus petitioners

stipulated to knowingly using the mails to transport the materials alleged, agreed as to authenticity of the exhibits and admitted knowledge of the contents.

Inasmuch as petitioners conducted business in Lemon Grove, California, and the trial took place in Alexandria, Virginia, it must be recognized that a substantial saving in court time, as well as witness expenses were saved by petitioners' desire to litigate only the issue of obscenity.

During the course of the first day of trial (indeed the only day of trial) a jury was picked, opening statements made, evidence introduced, and films and brochures were shown to the jury. At 2:45 P.M., the defense was called upon to begin its case. The following colloquy took place between the court and defense counsel [p. 48 Tr. of Proceedings].

"MR. ATKINS: Your Honor, I understand that Mr. Pickard has now rested. And I have one witness who will testify about the survey of the Washington, D.C. area, and that should be reasonably extensive. And then I have some offers to make that won't be extensive, and then I have a psychiatrist and a clinical psychologist who are flying in tonight.

THE COURT: Tonight? The trial is set for today.

MR. ATKINS: They will be able to testify first thing in the morning.

THE COURT: They may not testify at all. When we're ready for them they have to be here.

Let's get the jury in and move the case along."

The defense called its first witness, Mr. Gayle Essary, who testified concerning a public opinion survey his company performed in the Eastern District of Virginia, Alexandria Division vicinage.

Mr. Essary's testimony was concluded at 4:00 P.M., at which time defense counsel announced that its remaining witnesses would be available to testify at 9:00 A.M. the next morning.

The court summarily cut the defense off ruling that the defense had rested (over defense objection) and refused to permit the defense to continue its presentation of evidence the next day. The following colloquy took place [p. 105, line 11-p. 108, line 1 Tr. of Proceedings]:

"THE COURT: Your next witness, Mr. Atkins.

MR. ATKINS: Your Honor, my next witness will not be available until tomorrow morning at 9:00 o'clock. If Your Honor will bear with us until tomorrow morning—

THE COURT: Mr. Atkins, you are aware that the Court has already ruled on that point. Do you have any further witnesses that you want to introduce today?

MR. ATKINS: I have no more witnesses available today, Your Honor.

THE COURT: All right Mr. Atkins, do you rest your case?

MR. ATKINS: I do not rest my case, Your Honor. I had witnesses that I had planned to bring in tomorrow morning, but I have not had them available now, and I do not rest my case.

THE COURT: Well, the Court rules that you have no further witnesses that you are able to put on the witness stand at this time. The Court is going to have to conclude this trial. You have had an opportunity to have the witnesses here, and for reasons which I am sure seemed sufficient to you at the time you did not avail yourself of that opportunity; and I understand that you except for the record.

Does the Government have any rebuttal witnesses?

MR. PICKARD: No, Your Honor, we do not.

THE COURT: Are there any motions at this time?

MR. ATKINS: Out of the presence of the jury.

THE COURT: Yes. All right, the jury may withdraw.

(Jury not present)

MR. ATKINS: Your Honor, two motions and it will be very brief.

Firstly, Your Honor, I would like to make a motion for judgment of acquittal on the ground that the Government has not proved its case by evidence beyond a reasonable doubt, in view of the evidence that is already before the Court, unrebutted, as with regard to contemporary community standards.

The other motion, I would make is that in view of Your Honor's ruling with regard to witnesses, defense witnesses, I would most respectfully request a mistrial be granted so that my client can have a full trial. I think that under these circumstances, it being 4:00 o'clock in the afternoon, I don't think it is asking too much. That's my opinion, and I don't mean to get Your Honor mad at me, but—

THE COURT: Your Honor doesn't get mad.

MR. ATKINS: I have been an attorney for many years, Your Honor, and I have been in a lot of courtrooms and a lot of places, and I have always had some amount of cooperation. I would say if I wanted to waste a half day of a Court's time I wouldn't blame any Judge for throwing me out on my ear, I would expect it, but it is 4:00 o'clock in the afternoon, I did plan it that way, I admit, I did think that we would, without question, use up one full day, even before we got to any of the defense witnesses, but I did have Mr. Essary here because I thought if we did get to the defense case, that at least I would be able to offer Mr. Essary and not waste the Court's time.

I have made every effort to comply, and every effort not to waste a minute of the Court's time. It is 4:00 o'clock in the afternoon, and I don't really see anything outrageous or unreasonable about permitting an adjournment until the morning, when our witnesses will be here and be able to testify. And for that reason I most respectfully request a mistrial be granted, unless Your Honor would reconsider his ruling.

THE COURT: Both motions are denied."

Thereafter, the Court held an instruction conference, instructed the jury and let the jury retire for deliberation. At 9:17 P.M. [p. 138, lines 12-14] the Court ordered the jury to return the next morning for further deliberations.

The jury returned its verdict of guilty at 2:30 P.M. on September 10, 1974 [p. 151 Tr. of Proceeding].

(b)

On October 22, 1974, prior to sentencing, defense counsel moved the court for an independent determination of obscenity vel non (in effect and in fact a motion for judgment of acquittal) and offered the original exhibits (magazines) declared not obscene in the U.S. Supreme Court case of *Wiener v. California* for comparison as comparable material. Judge Warriner received *Wiener v. California* for comparison as comparable material. Judge Warriner received the *Wiener v. California* magazines, compared them and then denied petitioners' motion [pp. 2-5, line 9 Tr. of Sentencing Proceeding].

REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING SAME.

I

Petitioners Were Denied Due Process of Law by Reason of the Trial Court's Arbitrarily Cutting Off Petitioners' Presentation of Its Defense Case.

(a)

Trial was commenced in the within case on September 9, 1974 at 9:00 A.M.

The defense stipulated voluntarily to the truth of all allegations of the indictment with the exception of the obscenity vel non of the films and brochures themselves.

Inasmuch as the prosecution announced that it would have called some eleven witnesses, most of which would have had to be brought from California, it will be seen that the defendant's honest and good faith cooperation in litigating the within case expeditiously resulted in great savings to the taxpayer by way of saving travel expenses of witnesses, as well as a great deal of court trial time. The defense simply could have put the prosecution to its proof and at least one full court day would have been expended on the prosecution's case.

Instead, the defense chose to litigate only issues which it felt were genuinely in issue and therefore stipulated to all other facts including scienter (which proof would have been most time consuming).

In so doing, the defense did not expect to receive a "reward", however, it did plan its defense in terms of the calling of its own witnesses with the foregoing facts in mind, and did expect that some consideration

would be given if in some respects its planning turned out to be imperfect.

The prosecution's case was presented by way of the stipulation referred to and by calling two witnesses very briefly, and then by showing the films and exhibiting brochures to the jury. The defense began its case at approximately 2:30 P.M., presenting one witness, Gayle Essary (who had conducted an opinion survey). The defense also offered to present comparable material by way of materials found not obscene by the United States Supreme Court in another case (which offer was refused by the court).

When the foregoing was completed it was 4:00 P.M. and the defense than announced that two witnesses were flying to Virginia from California and would be available to testify the following morning.

The court then stated that if the defense witnesses were not then and there available, the defense would be deemed closed and argument and instructions to follow immediately. This procedure was in fact followed over the defense's objections.

The defense witnesses who were precluded from testifying were a psychiatrist, Dr. James Grold, of Los Angeles, and a clinical psychologist, Dr. Michael Ward, of San Francisco. Dr. Grold is an eminently qualified, Menninger Clinic trained psychiatrist who would have testified on the issue of prurient appeal and would have described exactly why the materials alleged to be obscene would not appeal to the prurient interest of the average healthy adult person.

Dr. Ward is a Harvard trained clinical psychologist, eminently qualified by training and experience and would have testified that he had conducted valid psycho-

logical studies and tests on approximately 30,000 average adults and that the results of exposure of healthy average adults to materials such as the materials involved in the instant case proved that the appeal was not a prurient one.

From the foregoing it will be seen that the defense was unable to present vital evidence on one of the most crucial issues of the case, namely, the prurient appeal of the allegedly obscene films and brochures.

Under the above circumstances, it is most respectfully urged that the trial court committed an abuse of discretion in failing to permit appellants to continue the presentation of their defense case the following morning by offering the testimony of the above-described two witnesses. The result of the breach of discretion was that petitioners were denied fundamental due process of law by being deprived of the right to present vital evidence on a basic legal issue.

The petitioners are not unmindful of a court's rightful concern that litigation be conducted diligently and expeditiously and in fact were so mindful of this concern that they cooperated in saving at least one full court day and much taxpayer's money in voluntarily stipulating to facts, the proof of which would have been expensive and time consuming.

Dr. Grold's expert witness fee was $1,000.00 per day, plus approximately $500.00 for traveling expenses; Dr. Ward's expert witness fee was $500.00 per day, plus $500.00 for travel expenses.

Scheduling their testimony for Tuesday morning, September 10, 1974, the defense sought to minimize the cost to petitioners that would have resulted if they had been brought in on Monday, September 9, 1974,

because they would most assuredly have been required to stay for more than one day and thereby double the expense to the petitioners. For all that the defense knew, the court would adjourn at or around 4:00 or 4:30 P.M. It must be recognized that Federal Courts normally do adjourn between 4:00 P.M. and 5:00 P.M.

It needs no citation of authority to state that where the defense is prevented and cut off from presenting a valid defense that due process is effectively denied.

In conclusion, it should be noted that the defense of an obscenity case differs from the defense of any other criminal case. The defense witnesses are not percipient witnesses. They are expert witnesses drawn from wherever they may be obtained, because their expertise (as regards sexual knowledge) is not common. In the ordinary criminal case it may not be unfair to require that all percipient witnesses be available at the beginning of the case.

However, in an obscenity case where the expert witnesses must be brought from afar and paid handsomely on a per diem basis for their expertise, it is extremely unfair to require such witnesses to perhaps sit around for a day or perhaps days waiting to testify. It is also unnecessarily burdensome financially.

It is most respectfully contended that under the above-stated circumstances it was an abuse of discretion to refuse to make the minor accommodation requested by the defense. The abuse of discretion resulted in a denial of procedural due process contrary to the Fifth Amendment of the United States Constitution.

(b)

Nevertheless and notwithstanding the full presentation of all of the above factors to the United States

Court of Appeals for the Fourth Circuit, the Court of Appeals affirmed petitioners' conviction resting its decision on the case of *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 56 n. 6 (1972) (See Appendix "B").

The particular language referred to in the *Paris Adult Theatre* case, *supra*, footnote 6 at page 56 is as follows:

> "This is not a subject that lends itself to the traditional use of expert testimony. Such testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand. *Cf. 2 J. Wigmore, Evidence* §§ 556, 559 (3d ed 1940). No such assistance is needed by jurors in obscenity cases; indeed the 'expert witness' practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony. See *United States v. Groner*, 479 F. 2d 577, 585-586 (CA5 1973); id., at 587-588 (Ainsworth, J., concurring). 'Simply stated, hard core pornography . . . can and does speak for itself.' *United States v. Wild*, 422 F. 2d 34, 36 (CA2 1970), cert. denied, 402 U.S. 986, 91 S.Ct. 1644, 29 L.Ed 2d 152 (1970). We reserve judgment, however, on the extreme case, not presented here, where contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest. See *Mishkin v. New York*, 383 U.S. 502, 508-510, 86 S.Ct. 958, 963-964, 16 L.Ed 2d 56 (1966); *United States v. Klaw*, 350 F. 2d 155, 167-168 (CA2 1967)."

The Fourth Circuit Court of Appeals apparently concluded from the above-quoted language that the

trial judge could have legally excluded *all* defense expert testimony and therefore no breach of discretion had occurred and no denial of due process. This conclusion is erroneous.

A companion case decided on the same day as *Paris Adult Theatre, supra,* not only clarifies this court's ruling but affirmatively states that petitioners *should* have the right to present appropriate expert testimony. That case is the case of *Kaplan v. California,* 413 U.S. 115, 93 S.Ct. 2680 (1973) at p. 2685 wherein this court states:

> "We also reject in *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 98 S.Ct. 2628, 37 L.Ed. 2d 446, any constitutional need for 'expert' testimony *on behalf of the prosecution,* or for any other ancillary evidence of obscenity, once the allegedly obscene material itself is placed in evidence. *Paris Adult Theatre I, supra,* 413 U.S. at 56, 93 S.Ct. at 2634-2635. *The defense should be free to introduce appropriate expert testimony.* See *Smith v. California,* 361 U.S. 147, 164-165, 80 S.Ct. 215, 224-225, 4 L.Ed. 2d 205 (1959) (Frankfurter, J., concurring), but in 'the cases in which this Court has decided obscenity questions since *Roth,* it has regarded the materials as sufficient in themselves for the determination of the question.' *Ginzburg v. United States,* 383 U.S. 463, 465, 86 S.Ct. 942, 944, 16 L.Ed.2d 31 (1966). See *United States v. Groner,* 479 F.2d 577, 579-586 (CA5 1973)." (Emphasis added).

It will be seen from the foregoing that the Fourth Circuit Court of Appeals' decision affirming the petitioners' conviction was grossly in error for erroneously

assuming that this court sanctioned the actual suppressing of a defendant's right to offer probative relevant evidence in his own defense. By definition, a trial includes the right to defend oneself. Where a trial court arbitrarily ties a defendant's hands by refusing to permit relevant, probative evidence, a fair trial has been denied.

For these reasons the judgment of the conviction must be set aside and a new trial ordered with directions to permit the defense to utilize expert testimony on essential issues with appropriate limits as to number, times, etc.

II

The Advertising Brochures Involved in the Within Case Are Not Legally Proscribable as a Matter of Law, but Instead Are Constitutionally Protected.

A. It Is the Duty of Each Court to Which the Issue Is Presented to Make Its Own Independent Constitutional Judgment With Respect to the Legal Obscenity of the Materials in Question.

It is now well settled that each court before whom the issue is raised is required to make its own serious and independent determination as to whether the materials brought before it are indeed in violation of the Federal Obscenity Statute (18 USC 1461 and 1462) or whether the materials are instead constitutionally protected.

The U.S. Supreme Court stated in *Jacobellis v. Ohio,* 378 U.S. 184, 188-189:

> "The Supreme Court in its decisions of May 8th and June 12, 1967, illustrated the necessity and requirement for exercising independent judgment when it reversed per curiam the number

of cases involving magazines, films, photographs, etc., and held that they were all entitled to protection under the First Amendment of the United States Constitution or in the state cases under the First and Fourteenth Amendments of the United States Constitution."

Indeed, this principle has been reaffirmed and followed by the U.S. Supreme Court as recently as June, 1974, in the case of *Jenkins v. Georgia,* 94 S.Ct. 2750, 42 L.Wk. 5055 (1974).

In the *Jenkins* case, *supra,* a Georgia State Court jury convicted a theatre owner of violating the Georgia Obscenity Statute by showing the film "Carnal Knowledge" in a theatre. The Georgia Supreme Court affirmed the conviction despite the fact that the film had been critically acclaimed as one of the ten best films of the year.

The U.S. Supreme Court reversed. The Court held that juries did not have unbridled discretion and that independent review by appellate courts was necessary, and did so in the following language at page 2755:

> "But all of this does not lead us to agree with the Supreme Court of Georgia's apparent conclusion that the jury's verdict against appellant virtually precluded all further appellate review of appellant's assertion that his exhibition of the film was protected by the First and Fourteenth Amendments. Even though questions of appeal to the 'prurient interest' or of patent offensiveness are 'essentially questions of fact,' it would be a serious misreading of Miller to conclude that juries have unbridled discretion in determining what is 'patently offensive.' Not only did we there say that

> 'the First Amendment value applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary,' 413 U.S. at 25, but we made it plain that under that holding 'no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct . . .' 413 U.S. at 27."

B. The Advertising Brochures.

As stated above, at the conclusion of the trial of the within case, the trial court granted judgments of acquittal as to Counts One, Two and Three. Inasmuch as Counts One, Two and Three were the only ones which contained films, the only materials which are now before this court are the ones charged in connection with Counts Four through Eleven and these consist only of advertising brochures.

On October 22, 1974, the defense made a motion for an independent determination of obscenity vel non of the pertinent advertising brochures. In connection with this motion, the defense offered the original magazines which were exhibits in the case of *Wiener v. California*, 404 U.S. 988, 92 S.Ct. 534 (1971), for use as comparable material to be compared by the trial court. The trial court did receive the *Wiener* exhibits and after comparison denied the defense motion.

The Court of Appeals for the Fourth Circuit also compared the materials and found that the instant brochures were distinguishable from the *Wiener v. California, supra,* materials.

It is most respectfully contended that if there are distinctions they are distinctions without legally significant differences.

It is most respectfully requested that this court also make an independent and final determination as to whether the advertising brochures in the within case are in fact comparable to the *Wiener* magazines because it is most respectfully contended that the depictions in the within advertising brochures taken as a whole are in all respects comparable to the *Wiener* material, especially when viewed against the background of the new guidelines set forth in the case of *Miller v. California*, 93 S.Ct. 2607, 413 U.S. 15 (1973).

In the *Miller* case, *supra*, the Supreme Court laid down new guidelines as follows at page 2615:

> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest. *Kois v. Wisconsin, supra*, 408 U.S. at 230 (1972), quoting *Roth v. United States, supra*, 354 U.S. at 489 (1957), (b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

The court then went on to amplify the second test (b) by giving some "plain examples" of what patent offensiveness could consist of as follows at page 2615:

> "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated;

> "(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."

It will be seen that in each instance all of the proscribable depictions are limited by the words "patently offensive." The Supreme Court then went on to further amplify that patent offensiveness was equatable with "hard core" depictions in the following language at page 2616:

> "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution. See *Roth vs. United States, supra*, 354 U.S. at 491-492 (1957)."

It will be seen from the foregoing that the U.S. Supreme Court required that depictions be "patently offensive" and then equated the required patent offensiveness with "hard core" depictions.

One year later the United States Supreme Court in the case of *Jenkins v. Georgia, supra*, reiterated the above set forth delineations in the following language:

> "Not only did we there say that 'the First Amendment value applicable to the states through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary', 413 U.S. at 25, but we made

> it plain that under that holding 'no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct . . .' 413 U.S. at 27."

While the brochures offered in the within case in connection with Counts Four through Eleven do contain some depictions which are lurid and imply sexual activity, they are simply not the kind of "patently offensive", "hard core", "out-and-out" depictions which leave nothing to the imagination. The brochures in the within case contain some depictions which give the leer of and imply sexual activity, but taken as a whole they are not "hard core" descriptions of "ultimate sex acts". They simply fall short of being the kind of "hard core" depictions which are the only depictions which can be found to be legally proscribable. This is especially so when viewed in connection with the *Wiener* materials (magazines).

It is most respectfully urged for the foregoing reasons that the advertising brochures in the within case are not legally proscribable because they are not "patently offensive", "hard core" depictions.

Although there is considerable display of nudity of some of the depictions contained in some of the brochures, nudity is not obscenity as was stated in the case of *Jenkins v. Georgia, supra,* where the court stated:

> "There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the *Miller* standards."

This court's attention is also invited to the magazines introduced into evidence such as "Playboy", "Oui",

and "Penthouse" which were offered into evidence in the trial [p. 104, line 4, to p. 105, line 5 Tr. of Proceedings]. These exhibits contain depictions of nude males and females in juxtaposition to one another which are, it is most respectfully contended, fully comparable to the depictions contained in the brochures in the within case.

It would be ludicrous indeed to permit the petitioners in this case to stand convicted of mailing advertising brochures containing depictions of implied sexual activity which are in all respects comparable to similar depictions existent on all the newsstands in the nation, including those in Alexandria, Virginia.

Conclusion.

For the above set forth reasons, it is most respectfully submitted that the within Petition for Writ of Certiorari be granted.

Respectfully submitted,

NORMAN R. ATKINS,
Attorney for Petitioners.

APPENDIX A.

United States Court of Appeals for the Fourth Circuit.

United States of America, Appellee, versus Robert J. Baranov, World Mailing Service, Inc., d/b/a World Mailing Service, Appellants. No. 74-2284.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. D. Dortch Warriner, District Judge.

Argued February 2, 1976.

Decided May 19, 1976.

Before HAYNSWORTH, Chief Judge, FIELD and WIDENER, Circuit Judges.

Norman R. Atkins for Appellant; Robert McDermott, Assistant United States Attorney, (William B. Cummings, United States Attorney, and Stephen R. Pickard, Assistant United States Attorney, on brief) for Appellee.

PER CURIAM:

A grand jury indicted Robert J. Baranov and World Mailing Service on eleven counts for sending obscene materials through the mail in violation of 18 U.S.C. §§ 1461 and 1462. After a trial lasting one full day, a jury convicted the defendants on eight counts. Prior to sentencing, the defense counsel requested the court to make an independent determination of whether the materials were obscene. To sharpen the issue, counsel submitted certain magazines—the original exhibits declared not obscene by the Supreme Court in *Wiener v. California*, 404 U.S. 988 (1971)—for comparison with the advertising brochures at issue in the present case. The district judge received the magazines, compared them with the advertising brochures and declined to overturn the jury's verdict.

Independently, we arrive at the same conclusion. Utilizing the guidelines set forth in *Miller v. California*, 413 U.S. 15, 24-27 (1973), we find that the average person applying contemporary community standards would find that the brochures appeal to the prurient interest. We also find that the brochures are patently offensive representations of ultimate sex acts, normal or perverted, actual or simulated. Finally, we perceive and the appellants' counsel readily admits, that the brochures lack serious literary, artistic, political or scientific value.

Baranov and World Mailing Service argue that their advertising brochures are indistinguishable from the magazines declared not obscene in *Wiener*. We disagree. The contact of male and female genitalia that is present here was not present in *Wiener*. The ultimate acts of orgasm and sodomy that are portrayed here were not portrayed in *Wiener*.

Because we conclude that none of appellants' arguments have merit, we affirm the judgment of the district court.

AFFIRMED.

APPENDIX B.

Order.

United States Court of Appeals, for the Fourth Circuit.

United States of America, Appellee, versus Robert J. Baranov, World Mailing Service, Inc., d/b/a World Mailing Service. Appellants. No. 74-2284.

Upon consideration of the petition for rehearing, and based upon *Paris Adult Theater v. Slaton*, 413 U.S. 49, 56 n.6 (1972), with the concurrence of Judge Field and Judge Widener,

IT IS ORDERED that the petition for rehearing be, and it hereby is, denied.

/s/ Haynsworth
Chief Judge, Fourth Circuit

June 9, 1976

Filed: June 23, 1976.